

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

TOMMY BROWN, individually and on behalf
of all other persons similarly situated;

Plaintiffs,

vs.

TRANSWORLD SYSTEMS, INC., et al.,

Defendants.

CASE NO. 2:20-cv-00680-RSL

**PLAINTIFF'S REPLY TO
DEFENDANT TRUSTS'
OPPOSITION TO MOTION TO
PROVIDE AUTHORITY (ECF 70).**

NOTE FOR MOTION CALENDAR:

October 16, 2020

Plaintiff raised the issue of whether the counsel for the Trusts have authority to represent the Trusts in this litigation. In response, the Defendants have presented the affidavit of John G. Richards II, Vice President of U.S. Bank (ECF 71). The affidavit raises more question than it answers.

A party carefully crafts what it chooses to include in the affidavit and therefore, often what the affiant does not say can be more telling than what the affidavit does say. That appears to be true here.

In Paragraph 5 the affiant states the powers that he perceives the Special Servicer has to act on behalf of the Trusts:

In addition, the Special Servicing Agreement, among other things, designated FMER as a "Special Servicer" and as a "Servicer"

pursuant to each Trust's respective Indenture. The agreement authorized the Special Servicer to, among other things: (1) "retain[] counsel on behalf of the applicable Trust (whether directly or through collections agencies) to further pursue enforcement and collection . . . including through litigation"; (2) engage Subservicers, "for and on behalf of the applicable Trust . . . to seek enforcement and collections of [defaulted or delinquent] Loans," and (3) commence any actions or proceedings "necessary or appropriate in connection with" such enforcement or collection efforts (Id. at ¶ 2(B)(i), (xv), and ¶ 4).

ECF. 71 at ¶ 5.

This case does not involve any of the three categories set forth which are limited to collection efforts. This is not a collection case. It is also not a counterclaim in a collection case. The authority identified in response to the motion does not apply here.

The Affiant does try to salvage the lack of authority later in the affidavit to show the special servicers alleged authority beyond the limited collection efforts identified in Paragraph 5. In Paragraph 10, the affiant references an agreement it has entered into with a collector, and a co-defendant in this case, TSI. He says:

TSI is also contracted under the TSI Agreement to manage litigation of defaulted student loans owned by the Trusts and, upon the Special Servicer's request, to manage litigation of claims asserted by debtors against the Trusts as counterclaims or arising out of special servicing debt collection. However, after it learns of a lawsuit, the Special Servicer has the right to defend such action on behalf of the Trusts.

ECF. 71 at ¶ 10.

Unlike in ¶ 5, the affiant in ¶ 10 does not cite to any provision of the Special Servicing Agreement when he sets forth the alleged rights given to TSI by the special servicer. The only reference is to the TSI Agreement (formerly known as the "default Prevention and Collection Agreement (ECF 71-2). The affiant seems to claim that by entering into an agreement with a collector, the special servicer's powers have been

1 enlarged beyond the actual authority granted in the Special Servicing Agreement. It is
2 equivalent to saying: if I give a deed to land I do not own, I can then rely on the deed to
3 show I have an interest in the land.

4 But even if the Court accepts that a special servicer can enlarge its rights to act by
5 entering into an agreement where it bestows rights (it does not have) to a collector, the
6 wording used cannot be ignored.

7
8 First it says TSI is the manager of the litigation if requested. If TSI was requested
9 to manage this litigation (and assuming it had the authority to do so), there is nothing
10 to show that it hired counsel for the Trusts in this action. In a different action pending
11 before this District, the Defendants maintained that the authority to hire counsel for
12 the Trusts rested with TSI pursuant to its role as manager of the litigation. In *Hoffman*
13 *v. Transworld Systems, Inc.*, Case No. 18-cv-01132-TSZ, (ECF 88) the Trusts argued at
14 p. 5 “The Default Prevention And Collection Services Agreement Grants TSI The Right
15 To Retain Counsel To Defend The Trusts.” The same Default Prevention And Collection
16 Services Agreement applies in *Hoffman* as here. Therefore, TSI has the right to retain
17 counsel for the Trusts. There is nothing presented to show that TSI retained the
18 Defendant Trusts’ counsel in this case.

19
20 If we assume that TSI was not asked to manage this litigation, and the special
21 servicer was in charge under its agreement with TSI, the issue of whether the special
22 servicer has the power to hire counsel to defend an action like this one is brought to the
23 forefront. It is not a power its own affiant identified as a power of the special servicer in
24 ¶ 5. Thus, the effort to create a power out of whole cloth fails.

CONCLUSION

Washington law requires counsel for NCSLT Trusts “to produce or prove the authority under which he or she appears”. Wash. Rev. Code Ann. § 2.44.030. This should not be a difficult task.

Given the irregularities that have been going on in multiple cases around the country, this District, and the irregular and incomplete response to the motion here, it is necessary now, to avoid problems later, that counsel who have appeared on behalf of the Trusts show they are authorized to do so. They have not done so. Kristine E. Kruger and Thomas N. Abbott have not produced or proven the “authority under which he or she appears” pursuant to Wash. Rev. Code Ann. § 2.44.030. Therefore, their prior or future acts in this litigation cannot be relied on by the Court or the Plaintiff until this issue is resolved. The Court should grant appropriate relief.

Dated this 16th of October 2020.

/s/ Christina L Henry

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